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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 PAUL EDWARD TIMBERLAKE,

12 Petitioner,

13 v.

14 KELLY SANTORO, Warden,

15 Respondent.
16

No. 1:20-cv-00013-NONE-SKO (HC)

**FINDINGS AND RECOMMENDATION
TO DENY MOTION FOR STAY AND
DISMISS PETITION WITHOUT
PREJUDICE**

[Doc. 26]

17 Petitioner is a state prisoner proceeding *in forma pauperis* with a petition for writ of
18 habeas corpus pursuant to 28 U.S.C. § 2254. He is represented in this action by Fay Arfa, Esq.
19 Pending before the Court is Petitioner's motion to stay the proceedings in this action under either
20 Rhines v. Weber, 544 U.S. 269, 277 (2005) or Kelly v. Small, 315 F.3d 1063 (9th Cir. 2002).
21 Because direct review has not concluded, the Court finds that it should abstain from interfering in
22 ongoing state proceedings pursuant to Younger v. Harris, 401 U.S. 37 (1971), and that a stay of
23 federal proceedings is inappropriate. For reasons that follow, the Court will recommend that
24 Petitioner's motion for stay be DENIED, and the petition be DISMISSED WITHOUT
25 PREJUDICE.

26 **I. BACKGROUND**

27 On February 19, 2016, a Kern County jury found Petitioner guilty of second degree
28 murder (Cal. Penal Code, § 187(a); count 1). People v. Timberlake, 2018 WL 4002008 (Cal. Ct.

1 App. 2018). It also found him guilty of being a felon in possession of a firearm (Cal. Penal Code
2 § 29800(a)(1); count 2); carrying a loaded firearm as an active street gang member (Cal. Penal
3 Code § 25850(c)(3); count 3); and being an active member of a criminal street gang (Cal. Penal
4 Code § 186.22(a); count 4). Id. The jury further found true that count 2 was committed for the
5 benefit of or in association with a criminal street gang (Cal. Penal Code § 186.22(b)(1)); and
6 found true, as to all counts, personal firearm use enhancements (Cal. Penal Code §§ 12022.5(a);
7 12022.53(d)). Id. In a bifurcated proceeding, the trial court found Petitioner had suffered two
8 prior strike convictions (Cal. Penal Code § 667(c)-(j)), two prior serious felony convictions (Cal.
9 Penal Code § 667(a)(1)), and served two prior prison terms (Cal. Penal Code § 667.5(b)). Id. On
10 March 30, 2016, the court sentenced him to an aggregate prison term of 65 years-to-life. Id.

11 Petitioner appealed to the California Court of Appeal, Fifth Appellate District (“Fifth
12 DCA”). On August 22, 2018, the Fifth DCA affirmed the judgment but remanded the matter for
13 resentencing. Id. Petitioner filed a petition for review in the California Supreme Court, and the
14 petition was denied on October 31, 2018. (Doc. 11-8.)

15 On January 18, 2019, Petitioner filed a petition for writ of habeas corpus in the Kern
16 County Superior Court. (Doc. 11-9.) On May 30, 2019, the superior court denied the petition.
17 (Doc. 11-10.) On June 19, 2019, Petitioner filed a habeas petition in the Fifth DCA. (Doc. 11-
18 13.) The petition was denied without prejudice for failure to declare the claims to be true under
19 penalty of perjury. (Doc. 11-14.) On July 29, 2019, Petitioner filed a habeas petition in the
20 California Supreme Court. (Doc. 11-15.) On October 30, 2019, the petition was summarily
21 denied. (Doc. 11-16.)

22 On January 6, 2020, Petitioner filed a petition for writ of habeas corpus in this Court.
23 (Doc. 1.) Respondent filed an answer on April 9, 2020. (Doc. 15.) On June 18, 2020, Petitioner
24 filed a traverse. (Doc. 18.) Thereafter, Petitioner retained counsel. Counsel discovered that the
25 trial court had not resentenced Petitioner in accordance with the appellate court’s August 22,
26 2018, order. (Doc. 24 at 3.) After counsel notified the superior court, the superior court
27 appointed an attorney to represent Petitioner in his resentencing. (Doc. 24 at 3.) On November
28 24, 2020, the superior court resentenced Petitioner. (Doc. 26 at 11.) Petitioner appealed to the

1 Fifth DCA, and the appeal is currently pending.

2 On January 4, 2021, Petitioner filed a motion for stay of proceeding pursuant to Rhines v.
3 Weber, 544 U.S. 269, 277 (2005) or Kelly v. Small, 315 F.3d 1063 (9th Cir. 2002). Respondent
4 filed an opposition on January 26, 2021, and Petitioner filed a reply on April 27, 2021. (Docs. 30,
5 33.)

6 **II. DISCUSSION**

7 A. Premature Petition

8 It is premature for this court to review Petitioner's collateral attack on his conviction,
9 because direct review is still ongoing, and there is no final judgment. A federal court's
10 jurisdiction to review the merits of a habeas petition commences, in pertinent part, on "the date on
11 which the judgment became final by the conclusion of direct review." 28 U.S.C. § 2244(d)(1)(A).

12 Under Younger v. Harris, 401 U.S. 37 (1971), federal courts may not enjoin pending state
13 criminal proceedings except under extraordinary circumstances. Id. at 49, 53. Younger abstention
14 prevents a court from exercising jurisdiction when three criteria are met: 1) there are ongoing
15 state judicial proceedings; 2) an important state interest is involved; and 3) there is an adequate
16 opportunity to raise the federal question at issue in the state proceedings. H.C. ex rel. Gordon v.
17 Koppel, 203 F.3d 610, 613 (9th Cir. 2000).

18 The Younger criteria are satisfied here. First, the appeal of Petitioner's resentencing is still
19 pending. Notwithstanding the fact that Petitioner's appeal concerns resentencing, the judgment is
20 not final. The Supreme Court has stated: "'Final judgment in a criminal case means sentence.
21 The sentence is the judgment.'" Burton v. Stewart, 549 U.S. 147, 156 (2007) (quoting Berman v.
22 United States, 302 U.S. 211, 212 (1937)). Second, resentencing proceedings implicate an
23 important state interest in enforcing criminal laws without federal interference. See Kelly v.
24 Robinson, 479 U.S. 36, 49 (1986) ("[T]he States' interest in administering their criminal justice
25 systems free from federal interference is one of the most powerful of the considerations that
26 should influence a court considering equitable types of relief") (citing Younger, 401 U.S. at 44-
27 45). Finally, the California state courts provide an adequate forum in which Petitioner may
28 pursue his claims. See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15 (1987) ("[A] federal court

1 should assume that state procedures will afford an adequate remedy, in the absence of
2 unambiguous authority to the contrary.”). When the state proceedings have fully concluded and
3 his conviction becomes final, Petitioner may seek federal habeas relief. See, e.g., Fellows v.
4 Matteson, 2020 WL 4805022 (C.D. Cal. May 18, 2020) (prisoner “may seek federal habeas relief
5 after his California state criminal proceedings, including his pending SB 620 motion in the
6 California Court of Appeal, have concluded with a final judgment of conviction.”). For these
7 reasons, the Court does not find that extraordinary circumstances warrant intervention.

8 The Court further notes that “courts in the Ninth Circuit have abstained under Younger
9 when a habeas petitioner's state resentencing appeal is pending.” Duke v. Gastelo, 2020 WL
10 4341595, at *4 (C.D. Cal. June 24, 2020), adopted, 2020 WL 4339889 (C.D. Cal. July 28, 2020);
11 Vanhook v. Burton, 2020 WL 5203439 (E.D. Cal. Sept. 1, 2020) (recommending denial of
12 motion for stay and dismissal of federal habeas petition due to pending state appeal for
13 resentencing); adopted, 2020 WL 5943013 (E.D. Cal. Oct. 7, 2020); Sauceda v. Sherman, 2020
14 WL 2510639, at *4 (C.D. Cal. Feb. 7, 2020) (recommending dismissal of a federal habeas
15 petition due to pending state appeal for resentencing under Cal. P.C. § 1170.95), adopted, 2020
16 WL 1433678 (C.D. Cal. March 22, 2020); Phillips v. Neuschmid, 2019 WL 6312573, at *3 (C.D.
17 Cal. Oct. 18, 2019) (“courts implicitly find that granting federal habeas corpus relief would have
18 the practical effect of enjoining or interfering with the ongoing state judicial proceeding, even
19 where the state proceeding is limited to sentencing;” recommending dismissal of habeas petition
20 due to pending state appeal for resentencing); adopted, 2019 WL 6310269 (C.D. Cal. Nov. 22,
21 2019) (collecting cases).

22 Based on the foregoing, the Court recommends that this action be dismissed without
23 prejudice as premature and barred by Younger.

24 B. Motion for Stay

25 Petitioner seeks stay and abeyance under Rhines v. Weber, 544 U.S. 269 (2005), or Kelly
26 v. Small, 315 F.3d 1063 (9th Cir. 2002). Respondent argues that Petitioner has failed to
27 demonstrate he is entitled to a stay.

28 A district court may, in limited circumstances, stay a petition pending exhaustion of

1 unexhausted claims if: (1) “the petitioner had good cause for his failure to exhaust;” (2) “his
2 unexhausted claims are potentially meritorious;” and (3) “there is no indication that the petitioner
3 engaged in intentionally dilatory litigation tactics.” Rhines, 544 U.S. at 278; Mena v. Long, 813
4 F.3d 907, 912 (9th Cir. 2016) (courts have discretion to stay and hold in abeyance fully
5 unexhausted petition under Rhines.). Each of these three conditions must be satisfied because, as
6 the court emphasized, “even if a petitioner had good cause for that failure, the district court would
7 abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly
8 meritless.” Rhines, 544 U.S. at 277.

9 A petition may also be stayed pursuant to the procedure set forth by the Ninth Circuit in
10 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). Under this three-step procedure: 1) the petitioner
11 files an amended petition deleting the unexhausted claims; 2) the district court stays and holds in
12 abeyance the fully exhausted petition; and 3) the petitioner later amends the petition to include the
13 newly exhausted claims. See King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009).

14 In this case, the Court finds that a stay is not appropriate under either Kelly or Rhines.
15 Under the Anti-terrorism and Effective Death Penalty Act (“AEDPA”), a one-year limitations
16 period for seeking federal habeas relief begins to run from “the date on which the judgment
17 became final by the conclusion of direct review or the expiration of the time for seeking such
18 review.” 28 U.S.C. § 2244(d)(1)(A). As previously noted, a “[f]inal judgment in a criminal case
19 means sentence. The sentence is the judgment.” Burton, 549 U.S. at 156 (2007) (quoting
20 Berman, 302 U.S. at 212). Until Petitioner’s judgment and sentence is rendered final “by
21 conclusion of direct review or by the expiration of the time for seeking such review,” AEDPA’s
22 one-year statute of limitations period will not begin to run. See Burton, 549 U.S. at 156-57.
23 Because the statute of limitations period for the filing of a federal habeas petition has not yet
24 begun to run, it would be inappropriate to grant a stay and abeyance. See, e.g., Banks v. Lynch,
25 2020 WL 6483903, at *3 (E.D. Cal. Nov. 4, 2020) (denying motion to stay as inappropriate where
26 limitations period had not yet started to run); Bennett v. Fisher, 2015 WL 6523689, at *1 (E.D.
27 Cal. Oct. 27, 2015) (stay inappropriate where limitations period has not even begun to run);
28 Torres v. Peery, 2015 WL 6437687, at *2-3 (E.D. Cal. Oct. 22, 2015) (denying stay and

1 dismissing petition where direct review of resentencing was ongoing and limitations period had
2 not begun to run); Henderson v. Martel, 2010 WL 2179913, at *6-7 (E.D. Cal. May 26, 2010)
3 (denying petitioner's renewed motion for a stay and abeyance as premature).

4 Therefore, the Court finds that the motion for stay should be denied.

5 **III. RECOMMENDATION**

6 For the foregoing reasons, the Court RECOMMENDS that the motion for stay be
7 DENIED and the Petition for Writ of Habeas Corpus be DISMISSED without prejudice.

8 This Findings and Recommendation is submitted to the United States District Court Judge
9 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
10 Local Rules of Practice for the United States District Court, Eastern District of California. Within
11 twenty-one (21) days after being served with a copy of this Findings and Recommendation, any
12 party may file written objections with the Court and serve a copy on all parties. Such a document
13 should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies
14 to the Objections shall be served and filed within fourteen (14) court days (plus three days if
15 served by mail) after service of the Objections. The Court will then review the Magistrate
16 Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file
17 objections within the specified time may waive the right to appeal the Order of the District Court.
18 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19
20 IT IS SO ORDERED.

21 Dated: April 28, 2021

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE